days later on October 18. She then continued outpatient treatment on every alternate day for one week and thereafter, once a week for the duration of six weeks or so. Her fractured jaws were still wired, when on May 7, 1973 she was examined by the Dental Specialist, General Hospital, Penang, Dr. Cheong Mow Lum. (See page 10 of Exhibit A). She had to go on liquid diet during the period. The scars on her chin were still visible. I noticed in court they were slightly visible. She was wearing plastic denture in place of her three missing upper teeth. She still had them while in court. During the proceeding she took them out at one stage while giving evidence. There was a gaping hole which to a certain extent mars her appearance but not so when she put them on again. No denture was made for the two lower teeth that were out of alignment with the other lower teeth because they were not extracted on her request. That she has suffered pain during the early period while in the hospital is obvious. She was having occasional pains in the region of the fractured jaws, but these have since ceased. She still had occasional pains on her left knee.

When she was having temporary denture, she could not chew properly. Later with permanent denture, she still had a problem with testing food because of the covering on the top part of the denture. She had to stay away from diplomatic parties for seven or eight months. I accept her evidence that the risk of it sticking or even falling, if one is not careful, when taking food like chicken or meat is present. As a wife of a diplomatic officer, she has to attend or host parties or dinners. She certainly has to be at her best in every aspect. The denture has caused her some embarrassment, particularly while eating during the parties. In the result she has to be extra careful and more alert than any other person with natural teeth and has to avoid some kinds of foods she likes for fear the denture might get loose. No doubt in the course of time she will get used to the denture, but all the same the handicap is always there. There is also the inconvenience apart from the embarrassment.

Taking into consideration the relevant authorities cited by both counsel as guidance and keeping in mind the fall in the purchasing power of money, I award a lump sum of $15,000 as general damages as fair and reasonable compensation. The sum includes the award of $10,000 for pain and suffering due to the fractures of both jaws and the loss of the three upper teeth, inclusive of the medical treatment and suffering she had undergone for quite some time. For the fractures of the jaws, in line with comparable cases, I assess the sum of $7,000 and for the latter injury, a sum of $3,000. For loss of amenities, for the reasons discussed earlier, the sum of $5,000, in my view, is fair and reasonable. In making this assessment, I bear in mind the element of overlapping. The plaintiff is also entitled to costs and interest.

Order accordingly.

Solicitors: *Chang & Vello; Tunku Zuhri, Manan & Abdullah.*

SALLEH BIN AWANG v. PUBLIC PROSECUTOR

[R.Cr.J. (Mohamed Zahir J.) May 8, 1978]

[Kota Bharu — Criminal Revision No. 2 of 1977]

Criminal Law and Procedure — Plea of guilty of using motor vehicle without valid driving licence — Expired licence — Whether accused guilty of using a motor vehicle without policy of insurance covering third party risks — Duty of prosecution to prove insurance was not in force — Road Traffic Ordinance, 1958, ss. 25(1), 74, 75 & 146.

Road Traffic — Driving licence — Genuine forgetfulness — Failure to attend court on revision — Road Traffic Ordinance, 1958, s. 79.

In this case the accused had pleaded guilty to two charges of using a motor vehicle without a valid driving licence and of using a motor vehicle without a policy of insurance covering third party risks. The accused, it appeared, had forgotten to renew his licence, which expired a month before he was summoned. The accused was fined $25 and $60 on each charge respectively and was disqualified from holding a driving licence for the period of one year. He wrote to request a review of the disqualification sentence.

Held: (1) it was for the prosecution to prove that the policy of insurance was not in force at the time of the use. Each case should be decided on the terms of the policy and section 79 of the Road Traffic Ordinance was irrelevant as to the criminal liability of the user;

(2) where a person genuinely forgot to renew his driving licence and at the material time he had no reason to believe that there was no insurance policy in force, then he could not be convicted under section 74(1) of the Road Traffic Ordinance and no disqualification would ensue;

(3) where a person was convicted of the offence of using a motor vehicle with no policy of insurance against third party risks in force, disqualification should follow the conviction unless there were special reasons;

(4) in this case as the accused had failed to attend the court on the revision, the court was unable to ascertain whether the third party was protected or not by reason of section 79 of the Road Traffic Ordinance and therefore the order of disqualification would be confirmed.

Cases referred to:-

(1) *Tan Kwang Chin* v. *Public Prosecutor* [1959] M.L.J. 252.

(2) *Demon* v. *Public Prosecutor* [1966] 2 M.L.J. 147.

(3) *Public Prosecutor* v. *Lim Ching Chuan* [1972] 1 M.L.J. 27.

(4) *Josephine Yii Chui Leng* v. *Public Prosecutor* [1973] 2 M.L.J. 47.

(5) *Public Prosecutor* v. *Sia Yok Hua* [1974] 1 M.L.J. 93.

(6) *Public Prosecutor* v. *Lee Hong Kee* [1969] 2 M.L.J. 60.

(7) *Public Prosecutor* v. *Nasir* [1972] 2 M.L.J. 39.

(8) *Velusamy & Anor.* v. *Public Prosecutor* [1974] 1 M.L.J. 15.

(9) *Public Prosecutor* v. *Ung Ah Leng* [1974] 1 M.L.J. 84.

(10) *R.* v. *Tan Hong Heng* [1965] 1 M.L.J. 124.

(11) *T.S.B. Maniam* v. *Public Prosecutor* [1946] M.L.J. 39.

CRIMINAL REVISION.

A. Wilson for the applicant.

Mohammed Apandi bin Ali (Deputy Public Prosecutor) for the respondent.

Mohamed Zahir J.: This case came up before me by way of revision. The applicant was on January 5, 1977 found guilty on the following charges:

"Tudohan Pertama:

Bahawa kamu pada 10.12.1976 jam lebih kurang pukul 11.15 pagi, di Batu 42 Jalan Kota Bharu/Kuala Krai, dalam jajahan Ulu Kelantan, dalam Negeri Kelantan, sebagai

pemandu m/van DB 9861, dapati telah gunakan kenderaan tersebut atas jalan raya tanpa lesen pemandu yang sah, dan olih yang demikian itu, kamu telah melalukan satu kesalahan dibawah seksyen 25(1)(2) dan bolih dihukumkan dibawah seksyen 146(1)(d) Undang Undang Lalu Lintas Jalan Raya No. 49 tahun 1958.

Tudohan Kedua:

Bahawa kamu pada tarikh, waktu dan tempat yang sama, sebagai pemandu M/Van No. DB 9861, dapati telah gunakan kenderaan tersebut atas jalan raya tanpa dilindungi olih Insurance Polisi atau keselamatan bahagian yang ketiga, dan olih yang demikian itu, kamu telah melakukan satu kesalahan dibawah seksyen 74(1) dan bolih dihukumkan dibawah seksyen 74(2) Undang Undang Lalu Lintas Jalan Raya No. 49 Tahun 1958."

He pleaded guilty on both the charges and he was fined $25 and $60 on each charge and in default to undergo two weeks' imprisonment. He was further on the second charge disqualified from holding a driving licence for a period of one year.

On February 8, 1977 he wrote a letter to me requesting me to review the disqualification sentence on him on the ground that the vehicle involved was a motor van and he had to pay $250 monthly instalment on it and that he had five dependants. He however submitted to the fines which I am of the opinion were on the low side. He overlooked to renew his licence which expired a month before he was summoned. On receipt of the letter I requested for the file from the Magistrate and on perusing it, I was of the opinion that that part of the sentence as to the disqualification should be reviewed.

The applicant having failed to file a notice of appeal I directed the Senior Assistant Registrar to ask Mr. Wilson of Messrs. Wilson & Co. whether he was prepared to help the court with the review. He replied in the affirmative. This case, however, was delayed in that the applicant apart from writing to the court was no longer interested in the case. The case could not be fixed for hearing early as, according to Mr. Wilson, the accused had failed to attend his office for instructions although requested to do so.

The case was fixed for hearing on August 20, 1977. A copy of the notice of hearing was sent to the applicant. He failed to attend the court on that day. Thus, the court is unable to ascertain whether the accused had in fact taken out a policy of insurance for his van and that such policy covered the liability towards third party by virtue of section 79(j) of Road Traffic Ordinance.

I, however, directed the case to proceed in view of the conflicting decisions by the courts in handing out judgment in cases of such nature. The issue to be decided is this: Whether a driver who does not have a driving licence at the time of driving or who has an expired driving licence, or carries excess passengers would be guilty under section 74(1) for using a motor vehicle without a policy of insurance notwithstanding the fact that the third party is protected by section 79.

The decided cases are all in the High Court stage and not a single one was sent up to the Federal Court so as to form a precedent for all the magistrates and judges to follow.

In *Tan Kwang Chin* v. *Public Prosecutor*[1] is a case where a learner driver was charged for driving with an expired driving licence under the repealed Motor Vehicles (Driving Licences) Regulations, 1952 and Motor Vehicles Third Party Risks Regulation. The question decided in this case was whether the insurance policy covered the driver or not and it was held that the policy covered the driver as the driver was permitted to drive by the owner and was not disqualified.

This case follows the unreported decision of Rigby J. in Penang Criminal Revision No. 9 of 1956. It would appear that the decisions in these cases rested entirely on the terms of the insurance policy. If the policy covered the driver then there would be no offence committed. Section 79(j) has not yet been in force.

In *Demon* v. *Public Prosecutor*,[2] a Sabah case where the driver carried excess passengers, it was held since section 7 of the Road Traffic (Third Party Insurance) Ordinance which made any restriction in the insurance by reference to the number of persons carried in the vehicle ineffective, the driver was not guilty of the offence. This section 7 is *in pari materia* to section 79(c) of Road Traffic Ordinance and it would appear there in this case, the driver was saved by the statutory provision.

In *Public Prosecutor* v. *Lim Ching Chuan*,[3] the driver was charged for driving a vehicle with an expired licence. The judge followed the decision of *Tan Kwang Chin* v. *Public Prosecutor* above and held that the driver committed no offence. Section 79 of Road Traffic Ordinance was not considered, only the terms of the policy was considered and it was held that the policy covered the driver.

In *Josephine Yii Chui Leng* v. *Public Prosecutor*[4] the driver was charged for not having a valid driving licence; she was driving with an expired licence. There was however evidence that the vehicle was covered by insurance policy and she was accordingly found not guilty. The learned judge in this case pointed out that the judge in *Tan Kwang Chin's* case did not appear to have considered the second limb of the disqualification provisions as to whether the driver was disqualified "by reason of any enactment or regulation in that behalf from driving the motor vehicle".

In *Public Prosecutor* v. *Sia Yok Hua*[5] where the accused drove a vehicle without a valid driving licence, it was held that section 79(j) of the Road Traffic Ordinance precluded the insurers from repudiating liability and the accused was at the material time duly covered by the insurance policy. The learned judge in that case stated as follows:

"What the position might have been before 15th January 1968 i.e. before section 79(j) of the Road Traffic Ordinance came into force is not a matter for me to go into for the purposes of this appeal. Section 79(j) makes it clear that although the appellant had no valid driving licence on the date in question, the insurance company are precluded from repudiating liability in respect of third party risks. For this reason I must rule that the appellant was duly covered by a policy of insurance on 21st November, 1971."

Thus, this case decides that after the coming into force of section 79 of the Road Traffic Ordinance, the question

as to whether the accused is covered or not by the insurance policy does no longer depend on the wording of the policy. The accused is covered by the legislative effect of that section so long as there is a policy to cover third party claims.

Some cases heard after January 15, 1968 did not consider the effects of section 79(j), for instance, *Public Prosecutor* v. *Lee Hong Kee*[6] and *Public Prosecutor* v. *Nasir*.[7] But *Velusamy & Anor.* v. *Public Prosecutor*[8] did. Suffian F.J. (as he was then) in this case sitting as a judge at Raub, held that section 79 merely provides that the restriction in the policy shall have no effect as regards the civil liability of the driver and did not affect his criminal liability. This case is followed by *Public Prosecutor* v. *Ung Ah Leng*[9] where Chang Min Tat J. (as he was then) followed *Velusamy's* case.

It would appear therefore from these two cases, although the injured third party can still recover from the insurers by virtue of section 79 yet the insurance policy itself does not cover such drivers as the policy expressly excludes any liability. In other words, the driver is not covered by the policy. The insurer is made to cover the third party by statute and not by the policy of insurance and it remains therefore that the driver is without "a policy of insurance as complies with the requirements of this part of this Ordinance". Section 75 provides for the requirements of the policy under the part. Section 75(1)(b) reads as follows:

"(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road."

The policy must insure the driver of any liability and if the policy excludes any liability then the driver is not insured under the requirements of this part of the Ordinance.

The position will therefore be if the policy insures the driver without having the insurance policy being compelled to be on risk under section 79 then the driver would be covered and on the other hand if the driver cannot sue the insurance company for breach of contract on account of the non-observation of the terms or contravening any of the conditions of the policy then the driver is not covered.

I agree with the principle decided in *Velusamy's* case above. I think each case should be decided on the terms of the policy and no reference should be made to section 79.

It is for the prosecution to prove that the policy was not in force at the time of the use. *R.* v. *Tan Hong Heng*[10] following *T.S.B. Maniam* v. *Public Prosecutor*.[11] The fact that the accused was proved to be driving the vehicle at the material time does not by itself constitute evidence that he is not covered by the policy.

Lastly, I have to consider whether a driver who drives a vehicle with an expired licence should be disqualified from holding a licence to drive for a period of at least 12 months. In cases where the driver forgets to renew his licence but he has taken a policy to cover the vehicle the third party would be protected by section 79 of the Road Traffic Ordinance. Will this case constitute special reasons which are relevant to the offence and not to the offender? Some of the special reasons appear under section 74(3) of the Ordinance which reads as follows:

"Provided that a person shall not be convicted of an offence against this section if he proves —

(a) that the vehicle did not belong to him and was not in his possession under a contract of hiring or loan; and

(b) that he was using such vehicle in the course of his employment; and

(c) that he neither knew, nor had reason to believe that there was not in force in relation to such security as complies with the provisions of this Part."

Thus, if a driver under (c) above has reason to believe that there is a policy of insurance in force then he will not be convicted under section 74(1) and no disqualification will ensue. So, if a person genuinely forgets to renew his licence and he at the material time had no reason to believe that there is no insurance policy then he should not be disqualified. It is quite different from the case where one drives a vehicle without a road tax licence and/or completely fails to take a policy of insurance and thereby section 79(j) would come in aid of the injured person. In this case I am of the opinion that the order for disqualification should follow the conviction unless there are special reasons.

In this revision since the driver has failed to attend the court and the court does not have the opportunity to ascertain whether the third party is protected or not by reason of section 79, I have to confirm the order made by the learned Magistrate.

Order accordingly.

Solicitors: *Wilson & Co.*

NG KEE LIN v. OOI SOON ENG

[O.Cr.J. (Syed Agil Barakbah J.) March 25 and May 20, 1978]
[Alor Star — Civil Suit No. 249 of 1976]

Practice and Procedure — Consent Order — Variation — Mistake — Jurisdiction of court — Principles which the court should apply.

In this case the defendant applied that a consent order be varied or corrected. The plaintiff and the defendants were partners in a registered partnership firm. The plaintiff applied for dissolution and accounts and a consent order was made which *inter alia* ordered that the accounts of the partnerships known as Thye Huat and Eng Huat be furnished. The defendant alleged that this part of the Order was made by mistake as the accounts of those partnerships could not be produced by the plaintiff without the concurrence of the other partners who were not parties to the action.

Held: (1) the court has a jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, although the mistake was on one side only, since the court has a general supervisory control over orders made on interlocutory applications;

(2) in this case there was a specific ground of mistake which enabled the order to be varied. The resulting error of facts was sufficiently substantial to call for a variation of the Consent Order.

Cases referred to:-

(1) *Mullins* v. *Howell* (1879) 11 Ch. D. 763.

(2) *B (GC)* v. *B (B.A.)* [1970] 1 All E.R. 913.

CIVIL SUIT.

T.R. Hepworth (*K. Balasundram* with him) for the applicant/defendant.